

<sup>1</sup> The total number of weeks is different from that stipulated to at the regular hearing and the number the Judge used in the award.

### ISSUES

The parties agreed claimant sustained a series of accidents that arose out of and in the course of her employment with respondent. Moreover, the parties agreed the appropriate date of accident for those injuries for purposes of computing claimant's benefits under the Workers Compensation Act should be April 12, 2004.

In the December 26, 2007, Award, Judge Foerschler granted claimant permanent disability benefits for a 19 percent right upper extremity impairment and a 28 percent left upper extremity impairment. The Judge indicated he was adopting the functional impairment ratings provided by claimant's medical expert, Dr. P. Brent Koprivica, as it was questionable whether the ratings from Dr. Brian J. Divelbiss complied with the AMA *Guides*<sup>2</sup>, as required by the Act. The Judge did not mention Dr. Prostic's medical report or the ratings contained in that report.

Respondent and its insurance carrier accept that claimant sustained repetitive trauma injuries to both upper extremities while working for respondent. They, however, argue the Board should consider Dr. Prostic's impairment ratings as the Judge ruled the doctor's report was part of the record. Moreover, they argue the Board should consider the ratings from Dr. Divelbiss because, contrary to the Judge's belief, those ratings were formulated using the AMA *Guides*. Finally, they argue the Board should discount Dr. Koprivica's ratings as he assumed claimant was continuing to experience nerve entrapment in her upper extremities.

Conversely, claimant argues the Judge properly ignored Dr. Prostic's medical report and ratings as the report does not indicate whether the doctor rated claimant using the AMA *Guides*. Claimant also argues the Judge properly rejected Dr. Divelbiss' ratings because the doctor did not consider claimant's residual loss of grip strength in rating her impairment. Moreover, claimant argues the doctor used his personal opinion rather than the *Guides* in rating claimant. In short, claimant argues Dr. Koprivica was the only doctor to properly use the *Guides* in rating claimant and, therefore, his ratings should be adopted.

Claimant also contends she should receive four separate awards as she has sustained four separate injuries listed in the schedule of K.S.A. 44-510d – the left wrist, left elbow, right wrist, and right elbow. She notes K.S.A. 44-510d does not provide that separate injuries are to be combined in determining the amount of permanent disability benefits that are due. Accordingly, claimant requests an award for a 10 percent

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<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

impairment to the right wrist, a 10 percent impairment to the right elbow, a 20 percent impairment to the left wrist, and a 10 percent impairment to the left elbow.<sup>3</sup>

The issues before the Board on this appeal are:

1. Did the Judge consider Dr. Prostic's medical report and, if not, should the claim be remanded to the Judge?
2. What is the extent of claimant's functional impairment and is claimant entitled to receive an award for two or four injuries under the schedule of K.S.A. 44-510d?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

Claimant developed both bilateral carpal tunnel syndrome in her wrists and bilateral cubital tunnel syndrome in her elbows while working for respondent. The parties agreed April 12, 2004, would be the date of accident for these repetitive trauma injuries, which developed over an extended period of time.

As a result of these injuries, claimant has undergone four surgeries to her upper extremities. In August 2004, Dr. John B. Moore performed bilateral endoscopic carpal tunnel release surgeries on claimant. In January 2005, Dr. Brian J. Divelbiss operated on claimant's left elbow and transposed the ulnar nerve. And in May 2006, Dr. Divelbiss performed another carpal tunnel release surgery on claimant's left wrist, which was an open procedure. And she is contemplating surgery on the right elbow.

Despite her injuries, claimant has returned to her job with respondent where she continues to perform computer keyboarding. Claimant notes that she has lost strength in her upper extremities as she is unable to open jars and bottles and continues to experience tingling in both elbows and wrists. Also, she now has difficulty playing the piano, cross-stitching, and doing needlepoint.

Because claimant has retained the ability to work, the Kansas Supreme Court decision in *Casco*<sup>4</sup> mandates that claimant's bilateral upper extremity injuries are to be compensated under the schedule of K.S.A. 44-510d. And K.S.A. 44-510d provides that

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<sup>3</sup> The Board requested respondent and its insurance carrier to address this issue but they declined.

<sup>4</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

a worker's functional impairment is to be determined by the *AMA Guides* when the impairment is addressed by that publication.

The record contains three functional impairment opinions. One opinion concerning claimant's functional impairment was provided by Dr. Divelbiss, who is a board-certified orthopedic surgeon. Dr. Divelbiss first rated claimant in early December 2005 as having a 15 percent functional impairment to each upper extremity. But in May 2006, the doctor performed the second left carpal tunnel release surgery. When the doctor rated claimant in January 2007, he left claimant's left upper extremity impairment at 15 percent but he decreased the right upper extremity impairment to 10 percent at the level of the right hand.<sup>5</sup> The doctor testified he reduced the right upper extremity impairment because claimant's right elbow symptoms had decreased.

In his January 22, 2007, letter to respondent's insurance carrier, Dr. Divelbiss indicated he utilized the *AMA Guides* in rating claimant. And at his deposition, the doctor explained how he utilized that publication:

Q. (Mr. Wimmer) And Doctor, how did you go about rating Ms. Peterson?

A. (Dr. Divelbiss) Well, it's a combination of looking at the *AMA guides*; looking at what sort of surgeries she had; looking at functional deficits; fitting that into an amount that fits with other ratings for other upper extremities, injuries and problems in the upper extremity.

Q. And in using the *AMA guides*, did you have a specific page number or chart or graph?

A. I don't have that listed here. Basically at her final visit she was noted to have some discomfort over her incisions and her grip strength was measured. She didn't really have a problem with range of motion in the wrist or at the elbow. Her primary problems were pain, and that if you tapped over her incision she got a little bit of nerve tingling which was the primary reason that she wanted to undergo that second surgery on her hand.<sup>6</sup>

On cross-examination Dr. Divelbiss acknowledged that he did not use either of the two methods set forth in the *AMA Guides* for evaluating entrapment neuropathy. The doctor testified, in pertinent part:

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<sup>5</sup> Divelbiss Depo., Ex. 2.

<sup>6</sup> *Id.* at 8, 9.

Q. (Mr. Kolich) Did you use either one of those methods [for evaluating claimant's entrapment neuropathy]?

A. (Dr. Divelbiss) Again, I did not specifically use either one of those methods. It's a matter of after doing this for long enough, getting an idea of what I feel is an appropriate rating for that patient and their residual symptoms, pain, residual numbness and grip strength.

Q. So you kind of use the guides as a reference, but in actuality --

A. I use them as a guide.

Q. In actuality you're relying upon your own experience and training?

A. I do use them as a guide, which is what they're there for.

Q. But you admitted you didn't use either one of these methods to --

A. I didn't specifically go to this chart because I've been doing carpal tunnel and cubital tunnel hundreds of times over the past -- each year. So I have a pretty good idea of what is a reasonable rating and how this fits into the whole scheme of the musculoskeletal section in regards to the upper extremity.<sup>7</sup>

On the other hand, Dr. Divelbiss testified claimant did not really have entrapment neuropathy in her upper extremities as she had undergone surgery. Finally, the doctor acknowledged he did not use the *AMA Guides* to assess claimant's impairment from the loss of strength in her hands or arms.

The record also includes the functional impairment ratings provided by claimant's medical expert, Dr. P. Brent Koprivica, who is board-certified in both emergency medicine and occupational medicine. Dr. Koprivica has limited his practice to impairment and disability medical examinations since 1992 and he uses the *AMA Guides* every day.

Dr. Koprivica examined claimant in April 2007 and determined she had developed multiple levels of entrapment neuropathy due to the repetitive trauma to her upper extremities. Dr. Koprivica rated claimant as having a 10 percent upper extremity impairment for each upper extremity for mild cubital tunnel syndrome. For her operated bilateral carpal tunnel syndrome, the doctor found claimant had a 10 percent right upper extremity impairment and a 20 percent left upper extremity impairment. The doctor rated the left operated carpal tunnel syndrome higher than the right because claimant had undergone two left carpal tunnel release surgeries.

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<sup>7</sup> *Id.* at 14, 15.

Combining the upper extremity ratings, Dr. Koprivica determined claimant had a 19 percent right upper extremity impairment at the elbow and a 28 percent left upper extremity impairment at the elbow.

In analyzing claimant's functional impairment Dr. Koprivica utilized the *AMA Guides* and considered claimant's mild electrodiagnostic findings in both her elbows and wrists. Dr. Koprivica testified the *Guides* does not indicate whether the results from surgery should be considered in determining an individual's upper extremity impairment, but to be consistent with other sections of the *Guides* the electrodiagnostic readings before surgery should be utilized.

Dr. Koprivica also analyzed claimant's impairment using her relative loss of strength. Based upon claimant's 68 percent loss of strength on the right and her 74 percent loss on the left, the *AMA Guides* yielded a 30 percent impairment to each upper extremity. Accordingly, the doctor felt his 19 percent and 28 percent upper extremity ratings were conservative.

The record also includes Dr. Edward J. Prostic's July 13, 2007, medical report, which was provided at the Judge's request. The Order for Independent Examination entered by Judge Foerschler on June 20, 2007, noted Dr. Prostic was to provide an opinion of claimant's functional impairment "pursuant to K.S.A. 44-510e(a), referring to the A.M.A. *Guides to the Evaluation of Permanent Impairment*, Fourth Edition."<sup>8</sup> At the regular hearing, claimant objected to Dr. Prostic's medical report because the report did not indicate whether the doctor utilized the *AMA Guides* in assessing claimant's impairment. But Judge Foerschler specifically ruled the report was part of the record. Nevertheless, the Judge neither listed the report as part of the evidentiary record nor mentioned the report in the body of his decision. Thus, there is a question whether the Judge considered the report. And K.S.A. 44-516 mandates that such report be considered by the Judge.

Respondent and its insurance carrier relied upon the Judge's ruling that Dr. Prostic's medical report was part of the record and, therefore, would be considered in this matter. Due to that reliance, and because one of the principal questions in this claim is whether Dr. Divelbiss' ratings complied with the *AMA Guides*, this matter should be remanded to the Judge to consider Dr. Prostic's medical report in determining claimant's functional impairment.

Regarding claimant's objection that the report does not indicate whether Dr. Prostic utilized the *AMA Guides* in analyzing claimant's impairment, the Board suggests the Judge should write Dr. Prostic to request the doctor to supplement his report with that information.

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<sup>8</sup> ALJ Order for Independent Examination (June 20, 2007) at 1.

In addition, as claimant now requests four separate awards, one for each wrist and one for each elbow, the Board suggests the Judge may wish to request Dr. Prostic to state the amount of functional impairment claimant sustained from the carpal tunnel syndrome and the amount of functional impairment claimant sustained from the cubital tunnel syndrome. In any event, after Dr. Prostic supplements his medical report, the parties should be given an opportunity to take the doctor's deposition to address any questions that might arise and to present any additional argument as may be helpful or necessary.

In short, this claim should be remanded to the Judge to consider claimant's functional impairment after considering Dr. Prostic's medical report and giving it such weight as it may deserve.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>9</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board sets aside the December 26, 2007, Award and remands this claim to Judge Foerschler for further proceedings as indicated above. The Board does not retain jurisdiction over this claim.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>9</sup> K.S.A. 2007 Supp. 44-555c(k).

**DISSENT**

I respectfully disagree with the majority of the Board as I would affirm the December 26, 2007, Award. Although the Judge failed to list Dr. Prostic's medical report as part of the record, I believe that was harmless error. I agree the report is part of the record as required by K.S.A. 44-516. But I do not believe the functional impairment opinions contained in that report should be considered as the doctor failed to state his ratings were based upon the *AMA Guides*, which the Workers Compensation Act requires.

At the regular hearing, claimant's attorney objected to Dr. Prostic's report on the grounds that the report did not disclose the doctor used the *AMA Guides* in assessing claimant's impairment. Accordingly, respondent's attorney was placed on notice that Dr. Prostic's opinions did not comply with K.S.A. 44-510d(a)(23) and, therefore, the doctor's ratings might not be considered as probative evidence.

In short, this claim should not be remanded to the Judge but, instead, decided by the Board based upon the evidence now before the Board. And based upon the present record, I feel the evidence is compelling that Dr. Koprivica followed the *AMA Guides* in assessing claimant's impairment but Dr. Divelbiss did not.

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant  
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge